Scheduled for Oral Argument on February 26 and 27, 2001

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOS. 00-5212, 00-5213

MICROSOFT CORPORATION,

Defendant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

MICROSOFT CORPORATION,

Defendant-Appellant,

—v.—

STATE OF NEW YORK, *ex rel.*
Attorney General ELIOT SPITZER, *et al.*,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE AMERICA ONLINE, INC., COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, PROJECT TO PROMOTE COMPETITION & INNOVATION IN THE DIGITAL AGE, AND SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN SUPPORT OF THE UNITED STATES AND STATE APPELLEES

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Parties And Amici

All parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief for Microsoft Corporation.

Corporate Disclosure Statement

America Online, Inc. ("AOL") is a leading Internet service provider and Internet access provider, has been at the forefront of the Internet's development, and has developed an important communications and content medium. AOL is a wholly owned subsidiary of AOL Time Warner, Inc.

The Computer & Communications Industry Association ("CCIA") is an international, nonprofit association of computer and communications firms as represented by their most senior executives. Small, medium and large in size, CCIA's members include equipment manufacturers, software developers, telecommunications and on-line service providers, re-sellers, systems integrators, third-party vendors and other related business ventures. CCIA exists to be a public voice for its members on issues of concern to them. It has no shareholders or other owners.

The Project to Promote Competition & Innovation in the Digital Age ("ProComp") is a trade association founded in 1998 by companies such as Sun Microsystems, Oracle, Netscape, and The Sabre Group for the purpose of analyzing competition and other policy issues relating to information technology. ProComp's membership consists of a number of companies and trade associations with particular knowledge and expertise in markets relevant to the issues raised in *United States v. Microsoft*, Nos. 98-1232, 98-1233 (D.D.C.), and to the future of the information technology sector of the economy. ProComp has no shareholders or other owners.

The Software & Information Industry Association ("SIIA") is the principal trade association of the software code and information content industries. SIIA represents more than one-thousand leading high-tech companies that develop and market software and electronic content for business, education, consumers and the Internet. Formed on January 1, 1999,

through the merger of the fifteen-year-old Software Publishers Association and the thirty-year-old Information Industry Association, SIIA leads industry efforts in e-business, copyright, privacy, taxation and other public policy issues; it is the only trade association with a global reach that provides a credible, unifying voice for all businesses that provide the software and information that underpin the digital economy. SIIA has no shareholders or other owners.

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(Authorities on which amici principally rely are marked with asterisks.)

CASES

TREATIES AND OTHER AUTHORITIES

GLOSSARY

[name] Dir. ¶ __	Written direct testimony of [name]
DX	Defendant's Trial Exhibit
FF	Finding of Fact (within 84 F. Supp. 2d 9)
GX	Government Plaintiffs' Trial Exhibit
HTML	Hypertext Markup Language, the principal programming language for creating displays on the World Wide Web
IAP	Internet access provider
ISVs	Independent software vendors
IE	Internet Explorer
OEMs	Original equipment (personal computer) manufacturers
PC	Personal computer
RX	Government's Remedy Exhibit
TCP/IP	Transmission Control Protocol/Internet Protocol, the primary communications protocol for the Internet
Tr.	Trial transcript

INTEREST OF AMICI CURIAE

The breadth and diversity of the amici curiae joining this brief reflect a fundamental commitment in the information technology industry to maintain legal protection of free competition under the antitrust laws. America Online, Inc. ("AOL") is a leading Internet and interactive service provider, and now owns Netscape and the Netscape Navigator browser, the targets of much of the conduct at issue in the trial. The Computer & Communications Industry Association ("CCIA") has represented computer technology and telecommunications companies for nearly thirty years, and participated as amicus curiae in the district court in this case and in the Tunney Act proceedings relating to the Microsoft consent decree. The Project to Promote Competition & Innovation in the Digital Age ("ProComp") is an association of technology companies and trade associations founded for the purpose of analyzing competition and other policy issues pertaining to information technology. The Software & Information Industry Association ("SIIA"), the principal trade association of the software code and information content industries, represents more than one-thousand companies that develop and market software and electronic content, and participated in two briefs as amicus curiae in the district court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves long-standing and well-settled principles of the Sherman Act condemning monopolization and attempted monopolization. Though antitrust courts are properly suspicious of allegations of predation, such cases do exist and amici will show that successful predation occurred here and was the means by which Microsoft defended its personal computer operating system monopoly. Amici will first summarize the evidence proving Microsoft's intent and strategy for monopolization and then turn to the economic analysis that explains the success of Microsoft's campaign and the case law that condemns it. We will then demonstrate that Microsoft's actions caused competitive harm. Finally, amici will show that appropriate and effective relief must be structural, and that the divestiture ordered by the district court is a proper form of such a structural remedy.

ARGUMENT

I.
THE EVIDENCE, THE ECONOMICS, AND THE LAW PROVE THAT MICROSOFT ENGAGED IN PREDATORY BEHAVIOR IN VIOLATION OF THE SHERMAN ACT

The core of this case involves Microsoft's use of a broad range of predatory tactics to maintain its existing monopoly over PC operating systems. Those tactics were designed not to yield efficiencies, but solely to preserve Microsoft's monopoly power by eliminating or marginalizing technologies that might threaten some aspect of the Windows monopoly.

A. Microsoft Spelled Out Its Plan to Monopolize.

1. This case is unusual in that Microsoft's senior executives spelled out their plan to monopolize in detail. Virtually every corporation has documents in its files that, usually in colorful language, express an intent to crush competitors. Courts routinely ignore such expressions as mere reflections of aggressive attitudes formed by hard competition. Microsoft's documents are different: they spell out not merely an attitude but a clear recognition of the threat to its monopoly and a detailed scheme for suppressing potential rivalry. These internal plans for predation, moreover, clearly were not motivated by any desire to achieve efficiencies, to satisfy consumer demand, or to sense any other legitimate business justification for the tactics employed. The claims of efficiency that Microsoft now advances are the figments of lawyers' imaginations, not the reasons given at the time by Microsoft executives.

Since the record of Microsoft's conduct and the effects of that conduct upon rivals are precisely what Microsoft intended and predicted, there can be no doubt that the company violated Section 2 of the Sherman Act. "Intent" is often a valuable "aid in characterizing ambiguous conduct," 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 805c, at 325 (1996); evidence of intent is relevant to the question whether the challenged conduct is predatory. *See Aspen Skiing v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 602 (1985); *see also Chicago Bd. of Trade v. United States,* 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences."). Here, however, the conduct is not ambiguous; it allows

only one conclusion and that conclusion is reinforced, made doubly certain, by the clear intent shown in Microsoft's planning.

2. Microsoft perceived that the Netscape Navigator browser posed a particularly serious threat to the Windows operating system monopoly. (*See* GX 20.) Navigator was the first commercially successful browser, and rapidly gained a large share among the then small proportion of computer users who browsed the World Wide Web. One of its features presented a "nightmare scenario" (GX 21, at MS98 0102397): as Microsoft Group Vice President Paul Maritz explained, if Navigator maintained a "significant market share" as Internet usage became more widespread, it could "become a real 'platform'" for applications (GX 498, at MS98 0168614), much like Windows itself. Either by itself or in conjunction with the Java programming language,[1] Navigator could serve as "an [operating system]-neutral Web platform" to which software developers could write applications "with no need for Windows." (GX 21, at MS98 0102397.) Maritz explained at trial, "if more and more applications programs get their services from Navigator and not from Windows, the perceived value of Windows is going to decline, and the ability to [use] other platforms will also be increased." (Maritz Tr., 1/28/99am at 56:21-57:1.) That would eliminate the applications barrier protecting Microsoft's monopoly in operating system, and open the market to competition.

Microsoft recognized the danger at once. Bill Gates said Netscape's new browser technology could "commoditize the underlying operating system" (GX 20, at MS98 0112876.3), which means that operating systems would become commodities like wheat or oil, commanding only a competitive rate of return. Other Microsoft executives were equally explicit. For example, Maritz testified that the browser and Java technologies had the potential to serve as a

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[1] Sun Microsystems' Java technology allows applications written in the Java language to run on both Windows and non-Windows platforms. Like Netscape's Navigator program, the Java technology threatened to make the use of non-Windows operating systems feasible to consumers.

virtual operating system. (Maritz Tr. 1/28/99am, 59:10 - 60:17, 62:7 - 63:21.) Accordingly, a competing browser could eventually "obsolete Windows." (GX 510, at MS7 004127.) These were competitive market possibilities Microsoft was not prepared to accept.

3. Microsoft counterattacked. It acquired a browser of its own, which later became Internet Explorer ("IE"). When IE failed to oust Navigator from the market in open competition, Microsoft joined its browser with its monopoly operating system, first by contractually bundling the browser with Windows 95, then by bolting the products together in Windows 98, so that personal computer manufacturers—OEMs—are forced to take both in one package. Moreover, Microsoft did not charge extra for the browser, pricing it at zero, thus selling it below cost. This forced Netscape to stop charging for Navigator. Microsoft's then President, Steve Ballmer, stated, "We're giving away a pretty good browser as part of the operating system. How long can [Netscape] survive selling it?" Jeffrey Young, *The George S. Patton of Software*, Forbes, January 27, 1997, at 86, 88. He said Microsoft had to expand into Netscape's territory lest Netscape encroach on his operating system territory. *Id.* The clear intent was not to compete with Netscape on the respective values of IE and Navigator, but to keep Netscape out of the operating system market altogether. That effort succeeded.

4. The purpose of bolting IE to the operating system is plain and was articulated in the company's internal memoranda. A senior Microsoft official wrote: "It seems clear that it will be very hard to increase browser market share on the merits of IE alone. It will be more important to leverage the [operating system] asset *to make people use IE* instead of Navigator." (GX 202, at MS7 004346 (emphasis added)). Another executive wrote: "I thought our #1 strategic imperative was to get IE share ([the IE group has been] stalled and their best hope is tying [IE] tight to Windows, esp. on OEM machines)." (GX 56, at TXAG 0009634.) Microsoft concluded in late March 1997 that if its monopoly product Windows and IE "are decoupled, then Navigator has a good chance of winning." (GX 355, at MS7 003001.) Microsoft followed the strategy set forth in these recommendations, and its share of the browser market grew quickly, propelled by the operating system monopoly.

Microsoft does not contest these internal statements of its intent to defeat Navigator not on the merits of its browser but by coupling IE with the monopoly Windows operating system. Instead, Microsoft has concocted a fictional version of history. We are told that the principal reason Microsoft hooked IE to the operating system was to benefit independent software vendors ("ISVs"). (Brief for Defendant-Appellant Microsoft, filed Nov. 27, 2000 ("Microsoft Br.") at 42.) This latter-day rationale does not square with the Microsoft memoranda quoted above, nor is it consistent with the very explicit statements on January 2, 1997, of Microsoft Senior Vice President James Allchin that Microsoft needed to begin "leveraging Windows from a marketing perspective" if it was to defeat Netscape. (GX 48.) "I am convinced we have to use Windows—this is the one thing they don't have. . . . We have to be competitive with features, but we need something more—Windows integration." *Id.* Allchin further stated that, "Memphis [the code name for Windows 98] must be a simple upgrade, but most importantly it must be a killer on OEM so that Netscape never gets a chance on these systems." *Id.* Microsoft concluded early on that it could not "win" without using its power over the "strong OEM shipment channel for Windows." (GX 48.) Indeed, even to "increase browser share," much less marginalize Netscape, would be "very hard . . . on the merits of IE 4 alone." (GX 202, at MS7 004346.) Given the uncertain result of competition on the merits, Microsoft decided instead to "leverage the OS asset"—i.e., monopoly power—to "*make* people use IE." *Id.* (emphasis added).

B. Microsoft's Campaign of Predation Was Economically Feasible.

1. While antitrust courts have been properly skeptical of many claims of predatory attempts to monopolize, they have also recognized that successful predation does occur. For predatory conduct to succeed, the predator must have greater financial resources than its victim, the predator must use techniques that do not cost it substantially more than resistance costs its prey, and the predator must be confident that it will recoup the costs of predation from a stream

of monopoly profits. In 1997, Microsoft's revenue was twenty-one times greater than Netscape's annual revenue,[2] and its monopolization campaign clearly satisfied the other two conditions.

The flaw in many claims of predatory monopolization is that the aggressor must incur much greater costs than its prey in order to keep or drive competitors from the market. *See Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 & 428 n.2 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986). That explains why competitive harm was unlikely to result from the allegedly predatory price-cutting in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Predation by cutting prices below incremental cost requires the predator to drive down prices by significantly expanding its rate of output. Since the predator presumably had been operating where marginal revenue equaled marginal cost and producing at a rate where marginal cost is rising, the predator incurs heavy losses. The victim, however, will suffer none of these consequences, since it need not increase output. The predator thus suffers much greater losses than its victim. That is a major part of the reason predation of this kind is rare.

Predation by pricing below marginal cost is unlikely for the additional reason that the predator must anticipate that it will be able to raise prices to the monopoly level and maintain them long enough "both to recoup the predator's losses and to harvest some additional gain." *Matsushita*, 475 U.S. at 589. Those profits, however, will attract new entry, which will defeat the purpose of the scheme.

These crippling disadvantages do not exist, however, where the predator need not outspend its victim and, in particular, where the predator is not a competitor seeking monopoly

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[2] In fiscal year 1997, Netscape reported revenues of $534 million. Netscape SEC Form 10-K, filed Mar. 27, 1998. For the same period, Microsoft reported a net income of $4.9 billion on revenues of $11.4 billion, and had cash on hand (cash and other short term investments) of $8.8 billion. Microsoft SEC Form 10-K, filed Sept. 25, 1998. Microsoft's cash on hand increased to $13.9 billion in 1998. *Id.*

but a monopolist seeking to preserve its position. Unlike the alleged predators in *Brooke Group* and *Matsushita*, Microsoft did not have to spend more than Netscape in order to keep Navigator below the usage threshold at which it could present an alternative platform to Windows. The heavy costs associated with the browser—more than $100 million a year—are largely fixed costs of research, development, and promotion. The incremental costs of manufacturing and distributing browsers do not vary with output, so that Microsoft's marginal costs—and its losses—were no greater than Netscape's. Netscape would lose just as much money, without having billions in annual profits from an operating system monopoly to sustain it.

More important, Microsoft was not gambling on recoupment. The defendants in *Matsushita* and *Brooke Group* would have had to sustain a stable cartel both to drive out competition and to maintain high prices after the predation succeeded. By contrast, Microsoft already had an operating system monopoly and could recoup the costs of predation simply by prolonging its stream of monopoly profits. The $100 million annual sacrifice in browser development costs was a tiny fraction of its operating system profits. Microsoft's predation was not the type alleged in *Brooke Group* or *Matsushita*: Microsoft did not need to sell browsers at a monopoly price to recoup, but merely had to delay or eliminate the possibility that browsers could undermine the Windows monopoly. That predation more than paid for itself every day that Netscape was held at bay, even if Navigator or another product later eroded the monopoly.

2. The Supreme Court has repeatedly condemned predatory conduct that, like the conduct here, was rational and profitable only in light of its anticompetitive effects. Thus, in *Aspen Skiing*, the Court upheld a jury verdict based on evidence that the defendant's alteration of established marketing arrangements reflected a willingness to forgo additional revenue, and to "sacrifice" associated "consumer goodwill," in order to reduce competition over the long run by harming its smaller competitor. 472 at 610 - 11. Similarly, in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." *Id.* at 174. Sham litigation may

succeed as a predatory tactic because the predator need not spend more money than the victim, and a firm that pursues sham litigation may outlast a rival with lesser financial resources.[3] Group boycotts succeed for similar reasons; although the costs of the foregone transactions may be equal on either side, the boycotters spread that loss widely among parties with greater aggregate economic resources than the single target who must bear the concentrated losses alone.

C. Microsoft's Predation Must Be Condemned Under Settled Legal Principles.

1. "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *Caribbean Broad. Sys. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998). Under the established analysis, however, a monopolist's conduct is predatory if it tries "to exclude rivals on some basis other than efficiency," *Aspen Skiing*, 472 U.S. at 605; indeed, "improper exclusion" is simply "exclusion" that is "not the result of superior efficiency." *Aspen* at 603; *see also Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483 (1992).

Microsoft's arguments that its conduct with respect to Netscape and others was lawful reduces to an insistence that a monopolist may decide how and with whom it will deal, regardless of any anticompetitive effects. But businesses do not have an unqualified right to choose their business practices. *See Aspen Skiing*, 472 U.S. at 601. To the contrary, precisely because a monopolist "maintains substantial market power," its "activities are examined through a special lens." *Kodak*, 504 U.S. at 488 (Scalia, J., dissenting). Behavior that might be competitively neutral when pursued by a non-monopolist "can take on exclusionary connotations when practiced by a monopolist." *Id.* (citing 3 Areeda & Turner, *supra*, ¶ 813, at 300 - 302).

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[3] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (power company allegedly used sham litigation to delay or prevent formation of municipal electric systems); *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 895 (2d Cir. 1981) (owners of existing shopping centers tied up would-be entrant in sham litigation until entrant, out of funds, abandoned its project).

The most important evidence, the Supreme Court has emphasized, is evidence that conduct was not related to any apparent efficiencies. *See Aspen Skiing,* 472 U.S. at 608 n.39.

2. Microsoft's conduct satisfied all of the traditional factors identified by the *Aspen Skiing* Court as indicative of illegal predation. *See id.* It had "overwhelming market size," and made statements showing a "specific intent to engage in predation." *Id.* It made threats that were not carried out when potential rivals capitulated, *id.*, as with Compaq, Intel, and Apple. *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 34 - 37 (D.D.C. 1999) (FF ¶¶ 94 - 110), 59 - 60 (FF ¶¶ 204 - 208). And, most tellingly, it utterly failed to demonstrate that its actions were motivated by, or produced, economic efficiencies. *See id.*

3. Microsoft's contrary arguments are refuted by *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). There, as here, an existing monopolist with a dominant technology was threatened by the appearance of a small company with new technology. The Journal was a newspaper whose "substantial monopoly . . . of the mass dissemination of news and advertising," *id.* at 147, made it "an indispensable medium of advertising for many [local] concerns," *id.* at 152. When a new radio station challenged the Journal's monopoly, the newspaper responded by refusing to accept local advertising from any Lorain County business that advertised on the station. *Id.* at 148 - 49. Because there was no apparent efficiency justification for the Journal's action, it was held to be predatory. *Id.* at 154.

The parallel between the Journal's actions and Microsoft's behavior is striking. Microsoft also has an overwhelming share of the market for PC operating systems. It also imposed conditions on those with whom it dealt that excluded rivals without any apparent efficiency justification. Just as the newspaper forbade its advertisers to deal with the radio station, Microsoft insisted that OEMs install Microsoft's browser IE in order to be licensed to install Windows. Thus, Microsoft's threat to cancel licenses for Windows was a naked threat to put OEMs out of business, a threat made credible by the fact that OEMs had only one source for operating systems. (Rose Tr., 2/17/99pm at 18:16-19.)

Aside from programs preloaded on new computers, the other significant channel for distribution of browsers was Internet access providers ("IAPs"), who provided each customer with a browser. Microsoft undertook a similar campaign with IAPs. Microsoft paid the major IAPs to use IE on an exclusive or near exclusive basis, providing Netscape Navigator only in response to specific (and rare) customer requests. *See* 84 F. Supp. 2d at 69 - 87 (FF ¶¶ 242 - 310).[4]

Microsoft entered an agreement with AOL and many others like it "at tremendous expense to itself," 84 F. Supp. 2d at 85 (FF ¶ 304), purchasing exclusivity, *id.* at 45 (FF ¶ 139), 77 (FF ¶ 272), rather than using efficiency to win consumers over to its product. As the district court found:

> Microsoft would not have absorbed the considerable additional costs associated with enlisting other firms in its campaign to increase Internet Explorer's usage share at Navigator's expense. This investment was only profitable to the extent that it protected the applications barrier to entry.

84 F. Supp. 2d at 45 (FF ¶ 141). (*See also* GX 202; GX 16, at MS98 0107183-84; GX 21, at MS98 0102397.) Because that conduct excluded Navigator on some basis other than efficiency, it was entirely appropriate for the district court to characterize that behavior as predatory.

4. There is no merit to Microsoft's claim (Microsoft Br. at 107 - 111) that its array of exclusionary practices cannot violate Section 2 because Netscape retained access to enough customers to survive as a niche product in the browser market. The argument is inapposite. Microsoft's foreclosure of Netscape from the market for operating systems was complete. Microsoft not only is a monopolist, but is a monopolist in a market characterized by powerful

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[4] As the trial court observed, "[t]he fact that Microsoft's arrangements with various firms did not foreclose enough of the relevant market to constitute § 1 violation in no way detracts from the Court's assignment of liability for the same arrangements under § 2." *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 53 (D.D.C. 2000). These exclusive arrangements "rendered Netscape harmless as a platform threat and preserved Microsoft's operating system monopoly in violation of § 2." *Id.*

network effects. In markets characterized by network effects, the value of a product to existing users increases with each additional user. Therefore, a monopoly is unlikely to be displaced unless a superior product gains a sufficient user base to allow it to leapfrog the incumbent.

Microsoft well knew that OEMs and IAPs were the most important channels for distribution (Fisher Direct Testimony ("Dir.") ¶ 214), that relatively few users would switch away from the browser provided by their IAP (*See* GX 93; Schmalensee Tr., 1/19/99pm at 62:11-63:18; Harris Dir. ¶ 92), and that—once browsers began to be preinstalled by OEMs—another "large chunk of customers" would "use whatever browser comes" with a computer (GX 370, at MS98 0121264). Microsoft's exclusionary conduct was devastatingly effective in preventing Netscape Navigator from gaining a sufficiently substantial user base to present an alternative programming platform that might commoditize the underlying operating system.

No product can threaten to replace Microsoft as the platform for PC applications unless the software is widespread. And no software product is likely to achieve that kind of scale when a parallel product is foisted on consumers by every major OEM and IAP. As Paul Maritz explained, Microsoft's tactics were designed to ensure that no competitor's "Web client [could] get to high volume." (GX 498, at MS98 0168614.) Those tactics could and did foreclose the practical channels through which Netscape might have maintained sufficient market share to present a platform alternative. The amount of exclusion achieved here was more than enough to "impair [its] ability to enter, expand, or survive." 3A Areeda & Hovenkamp, *supra*, ¶ 768b, at 149; *see also id.* ¶ 768f, at 157; Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust, reprinted in* 1 *Handbook of Industrial Organization* 537, 566 (Schmalensee & Willig eds., 1989).

D. Microsoft's Exclusionary Efforts to Intermingle Its Browser With Its Monopoly Operating System Violated The Sherman Act.

1. Microsoft escalated its exclusionary campaign against Navigator when it shifted its strategy from exclusion by contract to exclusion by technological integration, physically joining its browser to Windows by intermingling the code for the two products. That effort

forced *all* OEMs to accept IE, made it infeasible and costly for OEMs to load (and support) Navigator, and made it practically impossible for consumers to discard the Microsoft browser. No less than its campaign of exclusion by contract, Microsoft's strategy of bundling IE and Windows stemmed from a predatory desire to suppress competition rather than a legitimate desire to realize efficiencies—and the district court properly found that it violated the Sherman Act.

2. Microsoft contends otherwise, apparently believing that its conduct is wholly exempt from scrutiny under the antitrust laws as long as it can articulate any plausible efficiency benefit from the product combination. (*See* Microsoft Br. at 70 - 76.) Microsoft suggests that such an exemption was established in the divided decision of a panel of this Court interpreting the 1995 consent decree, *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) ("*Microsoft II*"). But its reading of *Microsoft II* is selective and erroneous; the decision in fact establishes no such rule. To begin with, the panel majority repeatedly emphasized the narrow scope of its decision. The decision only applied the standards of the consent decree and not those of the Sherman Act. *See id.* at 946, 950 ("Whether or not this is the appropriate test for antitrust law generally, we believe it is the only sensible reading of [the consent decree]."). In addition, the majority made clear that its conclusions were "subject to reexamination on a more complete record," *id.* at 952, and this case indeed presents such a record.

The panel majority obviously did not mean that "facially plausible benefits," *Microsoft II* at 950, overcome any and all evidence of monopolization, for that would mean that a lawyer's post hoc rationalization would confer per se legality on his client's deliberate predation.

Even if the *Microsoft II* majority had purported to construe the scope of the Sherman Act rather than the terms of the consent decree, the decision explicitly stated that "'commingling of code . . . alone is not sufficient evidence of true integration.'" *Id.* at 949 (quoting *id.* at 958 (Wald, J., dissenting)). Instead, because "[m]anufacturers can stick products together in ways that purchasers cannot without the link serving any purpose but an anti-competitive one," the

"concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." *Id.*

That is exactly what happened here. Based on an extensive record, the district court found that the combination of Microsoft's monopoly operating system and its browser—whether by license or by commingling of code—was neither necessary to achieve any efficiency benefit nor designed for that purpose. *See* 84 F. Supp. 2d at 45, 48 - 53 (FF ¶¶ 141, 153, 155 - 74). Once again, the words of Microsoft's own executives tell the real story: James Allchin summarized the company's strategy when he asserted that Microsoft needed "something more" than mere aggressive competition to extinguish the Netscape threat, and identified "Windows integration" as the answer. (GX 48.) Microsoft, he made clear, should focus on "finding ways to tie IE and Windows together," so that "Netscape never gets a chance." *Id.* Improving Windows had nothing to do with it.

It is worth noting that at the time these e-mails were written, Windows and IE were sold and distributed separately. Given Microsoft's motive for combining the two products, and the fact that they existed as separate products prior to the integration, it is not surprising, then, that removing the browser from the operating system would not compromise the functionality of the Windows operating system. *See* 84 F. Supp. 2d at 53 - 54 (FF ¶ 177). (*See also* Farber Tr., 12/8/98pm at 55:2 - 56:5; Farber Dir. ¶ 26; Felten Dir. ¶¶ 21, 22, 66; Weadock Tr., 11/16/98pm at 92:1-22; GX 355.) As Allchin himself testified, all nineteen of the alleged benefits of "integrating" IE into Windows 98 could be achieved by combining a retail version of Windows 95 and a retail version of IE 4.0, both purchased and loaded separately. (Allchin Tr. 2/1/99pm at 29 - 52.) "Bolting" the browser onto the operating system, in short, served no purpose but the anticompetitive one of "project[ing] monopoly power into [the] market" for browsers—a type of conduct unanimously condemned by the Supreme Court, *Kodak*, 504 U.S. at 498 (Scalia, J., dissenting) (noting unanimity on this point), and thus "derived not from technical necessity or business efficiencies," but from "a deliberate and purposeful choice to quell incipient competition." 87 F. Supp. 2d at 51. (The same lack of efficiencies also subjects Microsoft to

liability for Section 1 tying because its commingling of code served only "an anticompetitive purpose." *Microsoft II*, 147 F.3d at 949 & n.12).[5]

3. Under Microsoft's suggested approach, every form of bundling or bolting of products would be wholly immune from scrutiny under the antitrust laws, and the rhetoric of "one-stop shopping" would provide convenient cover for any monopolist desiring to forestall new forms of competition from adjacent industries or to extend its monopoly. Simply put, that is not the law. The Supreme Court's decision in *Kodak* squarely rejected the proposition that an antitrust claim could be taken from the factfinder whenever "the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market." 504 U.S. at 468. The Court instead "has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Id.* at 467 (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925)).

That approach compels a straightforward answer in this case. As the district court's opinion makes clear, Microsoft could have offered consumers all the benefits of integration by simply offering its browser as an option. Instead, Microsoft chose to "integrate" the two products, forcing OEMs and consumers to take a browser that they could not disengage and ensuring that every personal computer sold with Windows would also include IE—a competitive advantage that Netscape simply could not duplicate. In so doing, Microsoft inflicted direct harm on consumers and caused substantial harm to competition. The forced inclusion of IE at the time wasted valuable computer hard drive space, degraded system performance and caused customer confusion. *See* 84 F. Supp. 2d at 111 (FF ¶ 410). Microsoft's tying scheme thus plainly violated

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[5] Because of the space constraints of this brief, amici have elected to focus primarily on the district court's finding of Section 2 liability, and to defer to the United States and the state parties to more fully define the court's finding of Section 1 liability—which finding was fully supported by the record here.

the Sherman Act. *See Aspen*, 472 U.S. at 605 & n.32 (citing 3 Areeda & Turner, *Antitrust Law* 78 (1978)).

4. Microsoft's suggestion that any asserted integration of products by a monopolist should avoid all review under the antitrust laws is particularly uncalled for in the circumstances of this case. Microsoft's bundling of Windows and IE, whether by contract or by interspersing code, is not a conventional tying arrangement like the refusal to lease a can-closing machine unless the lessee agrees to purchase his can requirements from the lessor—it is actually a much more serious detriment to competition. In the case of the can-closing monopoly, the objection to such tie-ins has been that the possessor of a monopoly of can-closing machines can extend his monopoly to cans, thus obtaining two monopoly profits. Here, by contrast, Microsoft's objective was primarily to defend its operating system monopoly. The can closing machine and cans are complementary products. A browser, however, is not only a complementary product, but also is a potential substitute for a crucial function of the operating system: the browser could serve as a platform for software applications developers and, if it did, the operating system would be effectively "commoditized." (GX 20 at MS98 0112876.3.)

The usual criticism of tying law—that it is impossible to gain a second monopoly profit by tying a complementary product to a monopolized product—may not apply when the tied product has uses that are not wholly complementary to the monopoly product. Then, the tie may enable the capture of a second monopoly profit derived from the non-complementary uses. This applies here since the browser is not only a threat to the operating system monopoly, but also the means of access to the Internet. By gaining a monopoly in the browser market, Microsoft could both protect Windows and place itself in a position to exercise undue control over the Internet.

In addition, it is not difficult from a technical standpoint to physically "bolt" any two pieces of software together into a single bundle. If Microsoft avoids liability here, it can use the same technique to expunge any competitive threat. And contrary to Microsoft's suggestions, the application of well-settled principles of antitrust law to code-intermingling will neither pose more of a challenge to the courts than do the patent cases, FERC cases, or other antitrust cases

currently on the dockets, nor curb innovation. What would substantially impair competition and limit innovation is judicial acquiescence in schemes by monopolists, to redesign their software to prevent competition with their monopoly product.

II.
MICROSOFT'S CONDUCT CAUSED SUBSTANTIAL COMPETITIVE HARM

Microsoft contends (Microsoft Br. at 117) that there is no evidence of a causal link between its actions and the maintenance of its monopoly, because the district court could not be certain that "absent Microsoft's actions, Navigator and Java already would have ignited genuine competition in the market for Intel-compatible PC operating systems." 84 F. Supp. 2d at 112 (FF ¶ 411). The argument misses the point. The district court found it "clear . . . that Microsoft has retarded, and perhaps altogether extinguished, the process by which these . . . technologies could have facilitated the introduction of competition into an important market." *Id.*

Microsoft unjustifiably demands proof in this government enforcement action that successful entry into the operating system market would have occurred but for Microsoft's conduct. In monopoly maintenance cases it is by definition impossible to prove that the suppressed competition would have displaced the monopoly. By their nature, such cases require estimates of what would have happened in the absence of exclusionary conduct; no counterfactual exercise can lead to certainty. By the same token, however, a rational monopolist that could maintain its position legally, without investing in exclusionary activity, would not expend substantial resources on wholly unnecessary conduct. As a consequence, the law properly considers the fact of exclusionary conduct by a monopolist to be sufficient to prove a monopolization case, trusting the judgment of the monopolist's business personnel that without such conduct the monopolist likely would lose its dominance.

The causation issue here is not whether additional operating systems would have thrived in the market but for Microsoft's acts, but rather whether Microsoft successfully eliminated what it perceived to be potential competition that would have constrained Microsoft's exercise of monopoly power. The contemporaneous perceptions of the monopolist are the best guide. As

evidenced by communications among Microsoft's senior management (*see* pp. 3 – 5, *supra*), Microsoft crushed Netscape because it believed that the spread of browser software beyond Microsoft's control would erode the Windows monopoly. *See* 84 F. Supp. 2d 9, 31 (FF ¶ 80). Microsoft attacked Sun's cross-platform Java technology, which would have made it feasible for software vendors to write applications for non-Windows systems, for exactly the same reason. *See id.* at 30 (FF ¶¶ 76 - 77). With Microsoft's predatory campaign in the operating system and browser markets complete, we now know that neither Navigator nor Java technology poses any continuing threat to Microsoft's monopoly.

Microsoft's campaign to prevent competition in the browser and operating system markets was successful largely because of its impact on Netscape and Sun, but also because it stifled innovation and limited the competitive potential of several other companies. For example, by preventing OEMs such as Hewlett Packard, IBM, Gateway and Apple from installing non-Microsoft browsers on their PCs and from customizing their consumer interfaces, Microsoft limited the availability of competing products and caused these companies to lose sales revenues and incur greatly increased customer service costs. *See id.* at 66 - 69 (FF ¶¶ 230 - 241). Similarly, by coercing Intel into abandoning research on software that could have helped other companies compete with Windows, Microsoft hampered innovation and reduced the threat of competition to its operating system monopoly. *See id.* at 34 – 36 (FF ¶¶ 94 - 103).

III.
A STRUCTURAL REMEDY IS NEEDED TO PREVENT FUTURE ABUSE AND EXPANSION OF MICROSOFT'S MONOPOLY

Established principles of antitrust law require a structural remedy for the wide-ranging campaign of predatory monopolization proved in this case. Conduct remedies, standing alone, are inherently inadequate to constrain a monopolist such as Microsoft. Microsoft has the incentive and ability to undertake a similarly orchestrated campaign of exclusionary conduct whenever a new product threatens to mature into a technology that can leapfrog the PC operating system. Microsoft is already expanding the Windows monopoly to engulf additional technologies that might present alternative platforms. And no potential competing platform can become

sufficiently ubiquitous to offer a competing standard unless, at the outset, it is compatible with Windows and the primary applications that run on Windows—applications that Microsoft dominates with a ninety-six percent share. *See* Harry McCracken, *The Suite Hereafter: Sneak Peek at the Next Microsoft Office*, PC World, Nov. 1, 2000, at 62. Microsoft's demonstrated "proclivity for predatory practices" requires full and reliable equitable relief. *Otter Tail*, 410 U.S. at 381. The competitive problem presented by this case is a structural one: Microsoft's operating system monopoly provides both the source of the power that Microsoft abused, and the anticompetitive condition that Microsoft seeks to preserve and expand. The district court properly addressed that structural problem with a structural solution.

A. Conduct Remedies Are Inherently Insufficient To Constrain A Monopolist Demonstrably Committed To Widespread Anticompetitive Actions.

1. Under established antitrust remedial principles, structural reorganization is the preferred remedy in a major monopolization case brought by the government. In a monopolization case courts must "start from the premise that an injunction against future violations is not adequate to protect the public interest." *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128 (1948). That is because "[t]he track records of [conduct] remedies in dislodging monopoly power have . . . not been very promising." Areeda & Hovenkamp, *Antitrust Law* ¶ 704.3d, at 248 (2000 Supp.). The reason for that failure is plain. "Simply enjoining [particular] practices without attacking the structural monopoly does no more than encourage the monopolist to look for some new way of exercising its dominance that is not covered by the current injunction." *Id.* at 249. Thus, antitrust relief should not merely stop specific abuses, but should also "'pry open to competition a market that has been closed by defendants' illegal restraints.'" *Ford Motor Co. v. United States*, 405 U.S. 562, 577 - 578 (1972) ("*Ford Autolite*") (quoting *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947)).

In addition, not only does a conduct remedy place too much reliance on regulation rather than market forces, *see United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961), but "it is unlikely that, realistically, an injunction could be drafted that would be both

sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior" that an aggressive monopolist with demonstrated disregard for the antitrust laws "might employ in the future." *United States v. AT&T*, 552 F. Supp. 131, 168 (D.D.C. 1981), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983). Because divestiture "is simple, relatively easy to administer, and sure," *California v. American Stores Co.*, 495 U.S. 271, 281 (1990), "the *public*" is ordinarily "*entitled* to" that "surer, cleaner remedy." *Du Pont*, 366 U.S. at 334 (emphasis added). Thus, in *AT&T* and other cases, the Supreme Court has repeatedly approved divestitures even when the exercise of monopoly power, not its acquisition, was at issue. *See, e.g., United States v. United Shoe Mach. Corp.*, 391 U.S. 244 (1968); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188 - 90 (1944).

2. The litigation over the 1995 Microsoft consent decree underscores the practical impossibility of anticipating and preventing future monopolistic conduct. Conduct prohibitions that are ambiguous as applied to complex business practices cannot be effectively enforced by contempt. *See Microsoft II*, 147 F.3d at 940, 945 - 48. Moreover, the record here demonstrates that Microsoft does not take legal obligations seriously and cannot be trusted to comply with them. When the district court tried to enforce the 1995 consent decree, Microsoft responded by proposing to distribute a version of Windows that did not work—and with a straight face told the court that its order required such a response. *See United States v. Microsoft Corp.*, No. 94-1564 (D.D.C.), Tr. 1/14/98pm at 15. After more than a decade of antitrust enforcement scrutiny, Microsoft continues to use illegal means to short-circuit competitive challenges to its dominance. The district court properly concluded that it is time for those abuses to end.

B. Microsoft's Established Commitment To Predatory Conduct In Preservation Of Its Monopoly Requires A Structural Remedy.

1. Microsoft has the ability and incentive to continue to use predatory tactics to protect its monopoly power, to destroy additional competitive challenges and to extend its monopoly into adjacent markets. Although Microsoft suggests (Microsoft Br. at 85 - 87) that PC operating systems have lost technological and competitive significance, Bill Gates has publicly

and recently acknowledged that the 130 million PCs sold per year are "at the center of" computing and that the PC will be the dominant force in computing for years to come. *The Best Is Yet to Come*, Remarks to WINHEC 2000, New Orleans, Apr. 25, 2000; *see also* Remarks at COMDEX/Fall 2000, Nov. 12, 2000. Microsoft faces no imminent threats to its operating system monopoly. 84 F. Supp. 2d at 22 - 24 (FF ¶¶ 45 – 52). The Linux operating system is used on a very small share of new desktop PCs today, and Microsoft's share of client operating systems remains dominant. *Id.* Microsoft has a substantial equity stake in Apple Computer, and Microsoft recently purchased nearly twenty-five percent of Corel, which has provided the only visible competition to the Microsoft Office personal productivity suite. *See* Buckman & Baglole, Microsoft to Invest *$135 Million in Corel*, Wall St. J., Oct. 3, 2000, at B10; Gomes & Carlton, *The World Is Still a Pretty Scary Place for Apple*, Wall St. J., Aug. 8, 1997, at A3.

Microsoft is particularly likely to succeed in perpetuating its monopoly by resort to exclusionary measures because of the nature of the network effects in the market it controls. Where network effects are present, a single firm may achieve temporary dominance as a result of natural market forces. While that by itself does not justify invocation of the antitrust laws, monopolistic strategies are far more likely to succeed in a market characterized by network effects. Whereas innovation in such a market typically would result in the periodic replacement or leapfrogging of one accepted standard by another, the incumbent's built-in advantage makes exclusionary conduct particularly effective to forestall this process, increasing the likelihood of extracting supracompetitive profits. *See generally* Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 Cal. L. Rev. 479 (1998); Eric B. Rasmusen *et al.*, *Naked Exclusion*, 81 Am. Econ. Rev. 1137 (1991). A monopolist need not eliminate the rival, but merely must foreclose its ability to reach the critical mass of customers that make the difference between a niche technology and a potential successor standard.

2. The pattern continued with Microsoft's incorporation of IE into its Windows operating system. And now that the Internet has emerged as a leading force in commerce and communications, browsers are even more important than it appeared when this case began. The

browser is the interface through which all Internet computing must pass—a bottleneck as significant for computing based on Internet standards as the operating system bottleneck has been for the PC and client-based computing. Microsoft's campaign against Netscape has been phenomenally successful, yielding a monopolistic eighty-six percent share, as consumers continue to upgrade to Windows 98 (and its successors) with IE bolted on. *See Microsoft Share Surges in Web Browser Market*, Wall St. J., June 27, 2000, at B8. If that dominance persists, nothing will stop Microsoft from adding proprietary features to the browser in order to eliminate other Internet-based technologies, such as applications that consumers could use while on the Internet. Because such applications reside on the Internet, they do not need to be written for the Windows platform, and therefore, pose a threat to Microsoft. However, Microsoft can add proprietary extensions to the browser that would necessitate the Internet-based technologies to adopt and use Microsoft's proprietary technology. Such a shift to Microsoft proprietary technology on the Internet will not only buttress the current monopoly but also facilitate Microsoft's dominance over software products operating the servers comprising the Internet.

As Microsoft executive Paul Maritz put it, "the most important thing we can do is not lose control of the Web client," because "[b]y controlling the client, you also control the server." (GX 498 at MS98 0168614.) *See also* 84 F. Supp. 2d at 104 (FF ¶ 384). The trial exposed Microsoft's scheme to add incompatible, proprietary file extensions to the open, interoperable languages of the Web—HTML and Dynamic HTML—with the intent of driving out the current, universal, cross-platform standard and replacing it with a standard that Microsoft alone can control. 84 F. Supp. 2d at 67, 89 (FF ¶¶ 233, 322). (*See also* McGeady Tr. 11/10/98am at 21 - 22; GX 564, at 477 MSCID 00274.) Bill Gates has declared: "We are a very predictable company. What we did with Windows on the desktop, we're doing with Windows NT [now Windows 2000] on the server." David Kirkpatrick, *He Wants All Your Business and He's Starting to Get It*, Fortune, May 26, 1997, at 58 (quoting Gates). That campaign is well underway. Microsoft's latest server initiative aims to make all software dependent on a proprietary "Microsoft.NET" platform that takes the relevant parts from Windows and creates

those as Internet-based services. *See* Microsoft Corp. White Paper, *Microsoft.NET: Realizing the Next Generation Internet* (June 2000).

3. Similarly, to avoid the perceived threat to Windows from streaming media, *see* 84 F. Supp. 2d at 36 - 38 (FF ¶¶ 104 - 114); (GX 1368), Microsoft is tying Windows Media Player to Windows, both contractually and technologically, and on both desktop and server versions. *See* Stanley Holmes, *Microsoft May Be Testing the Limits Again*, L.A. Times, May 10, 2000, at A1. Microsoft is pursuing the same course with other software products, such as instant messaging software, that could be partial substitutes for the application platform function of Windows. *See* Matt Lake, *Windows Me Too*, PC World Online, June 22, 2000. To prevent handheld devices with non-Microsoft operating systems from becoming sufficiently widespread to threaten the Windows monopoly, Bill Gates instructed his staff to alter Microsoft Office to ensure that "our PDA [personal digital assistant] will connect to Office in a better way than other PDAs even if that means changing how we do flexible schema in Outlook and how we tie some of our audio and video advanced work to only run on our PDAs." (RX 1 at MSCE 0097924.)

4. A remedy should address where the market is going, not just where it has been, taking into account "probable future trends in the . . . market" that are "visible at the time" of the violation. *Ford Autolite*, 405 U.S. at 580 (Stewart, J., concurring in the judgment). Congress intended antitrust "decrees to deal with the future economic condition of the enterprise as well as past violations." *International Salt Co. v. United States*, 332 U.S. at 401 n.10 (1947). The sheer volume and variety of Microsoft's persistent and continuing efforts to use market power to preserve the dominance of Windows weigh heavily in favor of a structural remedy that strikes at Microsoft's ability and incentive to foreclose competition.

C. The Remedy Is Appropriately Tailored To The Violations Proved In This Case.

1. A district court that has found monopolization in a government case has a "duty . . . to prescribe relief" that accomplishes three goals. *United Shoe*, 391 U.S. at 250. First, the relief should "terminate the illegal monopoly." *Id.* Second, it should prevent "practices likely to

result in monopolization in the future." *Id.* Third, the order should prevent a monopolist from retaining the accrued competitive benefits of its illegal conduct. *Id.*

Rather than dictating a result or choosing a competitive technology, the Final Judgment merely creates conditions that will permit the market to make the choice without the distortions caused by Microsoft's abuse of monopoly power on multiple fronts. Unlike the *AT&T* decree, the judgment here places no limit on the lines of business in which the successor companies may engage.[6] Leading industry analysts agree that the remedy provides an "incentive for different Microsoft units to support non-Windows" [operating systems], and that this "change could dramatically alter the adoption rate for Linux and Mac OS." International Data Corp., *Client Operating Environments Market Forecast and Analysis, 2000-2004* at 13 (June 2000). Decisive action to reinvigorate competition is especially important given uncertain economic conditions and Microsoft's record of "deter[ring] investment in technologies and businesses that exhibit the potential to threaten Microsoft." 84 F. Supp. 2d at 112 (FF ¶ 412).

Microsoft also claims (*e.g.*, Microsoft Br. at 133) that the proposed reorganization would dissipate efficiencies that purportedly result from single-firm ownership of the Windows monopoly, the Office monopoly, and the browser monopoly. The supposed efficiencies resulting from single-firm control over several tiers of the software industry are illusory. Competitive markets are more efficient, and more robust, than Microsoft lets on. The rest of the software, computer and communications industries have thrived in areas where no such control—much less monopoly control—rests in one company. This competitive market structure has produced

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[6] Microsoft asserts (Microsoft Br. at 135-137) that the remedy's temporary conduct restrictions-particularly the requirement that Microsoft publish its APIs-wrongfully confiscate intellectual property. But Microsoft sees no problem even in the *absence* of an antitrust violation. Bill Gates telephoned three FCC commissioners to ask them to force AOL to disclose interface specifications for its instant messaging software. *In re AOL & Time Warner*, FCC CS Docket No. 00-30, Letter from Microsoft counsel Gerald Waldron to Magalie Roman Salas, at 2 (Dec. 15, 2000).

common standards such as TCP/IP and HTML, and has permitted interoperability for a stunning array of products.

2. Microsoft is not the first huge monopolist to claim that its company cannot possibly be divided to promote competition without ruinous results. The Bell System considered itself "a single integrated enterprise" that was "technologically integrated" and physically integrated nationwide. Brief of *AT&T, United States v. Western Electric Co.*, No. 87-5388, at 5 (D.C. Cir. filed July 25, 1989). It is well accepted that the divestiture of AT&T has unleashed nearly two decades of innovation, while lowering telecommunications prices and producing outstanding shareholder returns. Established principles of competition allow us to predict that the break-up of Microsoft will similarly inject competitive rigor into the industry, likely leading to increased innovation and consumer welfare.

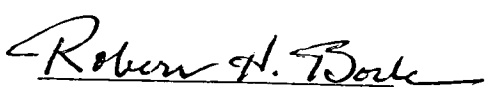
In the end, this case turns not on obscure issues of technology, but on black letter principles of law stressed by the Supreme Court for over a century. Microsoft simply did not care about the requirements of federal antitrust law. Disdaining an antitrust compliance program, Microsoft believed it could outlast and outspend any governmental adversary. To reward Microsoft by freeing it from antitrust liability and a meaningful structural remedy would contravene clear Supreme Court precedent and send an extraordinarily harmful message to the business community.

CONCLUSION

The judgment of the district court should be affirmed.

January 12, 2001

Respectfully submitted,



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